81 -2311

Docket No.

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In the Supreme Court of the United States

October Term, 1982

JOEL D. KERSEY, JR.
and
LOUIS RAY FREEMAN,
Petitioners,

v.

I.M. SHIPLEY, JR.,
R.A. LAKOSKI,
JOHN T. MAXWELL,
and
CITY OF CHESAPEAKE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

a) Whether the Petitioners were denied their procedural due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

b) Whether the District Court Judge improperly directed a verdict for the Respondents.

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1. Material Proceedings and Opinions Below

The petitioners, Joel D. Kersey, Jr., and Louis Ray Freeman, were police officers employed by the City of Chesapeake, Virginia. The respondents to this action are I. M. Shipley, Jr., acting Chief of Police, R. A. Lakoski, Chief of Police, John T. Maxwell, City Manager; all of whom are employed by the respondent, City of Chesapeake.

On May 3, 1979, the petitioners were ordered by acting Chief Shipley to take a polygraph examination pursuant to an administrative investigation of a complaint against the petitioners filed by a member of the community. Because the polygraph examination was not taken, the petitioners were terminated from their employment by Chief Lakoski.

Petitioners requested a hearing to review the action of Chief Lakoski.

Such a hearing was guaranteed them pursuant to a Virginia statute known as the Law Enforcement Officers' Procedural Guarantees. That hearing resulted in a recommendation by the presiding panel that the petitioners be reinstated to their employment as police officers.

Subsequently, Chief Lakoski exercised his power under the Law Enforcement Officers' Procedural Guarantees Statute to overrule the panel decision thereby deciding that the petitioners' termination would remain in effect.

Chief Lakoski's decision was reviewed and sustained by the City Manager, John T. Maxwell.

On May 19, 1980, petitioners filed a Complaint in the United States District Court for the Eastern District of Virginia, Norfolk Division, alleging,

among other things, that the respondents acted arbitrarily and capriciously, and that they acted separately and in concert, willfully, knowingly and purposely with the intent to deprive petitioners of their rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States, Title 42 of the United States Code, Section 1983 and Title 18 of the United States Code, Section 245 and further alleged a violation of their rights under the Code of Virginia, 1950, as amended, Section 2.1-116.1 (Law Enforcement Officers' Procedural Guarantees) and requested reinstatement to their former position of employment as well as back wages due and owing from the date of their first suspension.

Following a motion for summary judgment, the District Court (Chief Judge Richard B. Kellam) entered an Order dismissing the action on the merits.

The petitioners appealed the judgment of the District Court to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment by a published opinion, No. 81-1279, decided March 22, 1982.

2. Jurisdiction

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on the 22nd day of March, 1980. This petition follows within 90 days thereof (28 USC Section 2101(c)). Jurisdiction is invoked pursuant to 28 USC Section 1254 (1).

3. The Questions Presented for Review

a) Whether the petitioners were denied their procedural due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

b) Whether the District Court Judge improperly directed a verdict for the respondents.

4. Pertinent References

a) Amendment XIV of the United States Constitution.

b) Code of Virginia, 1950, as amended, Section 2.1-116 et seq.

See Appendix C for verbatim citation of pertinent references.

5. Statement of the Case and Material Facts

The basis for Federal Jurisdiction in the District Court is Title 28 of the United States Code, Section 1343, and 42 USC Section 1983.

All references are to the joint appendix filed as part of the record to the Fourth Circuit and shall refer first to the volume thereof, then the page, e.g. (Vol. I:p. 3).

The petitioners, Joel D. Kersey, Jr., and Louis Ray Freeman, were employed for approximately five years each as career police officers in the City of Chesapeake, Virginia. Both enjoyed excellent reputations and fine records as police officers. Both were married and had children.

On March 2, 1979, Mr. Freeman and Mr. Kersey met to socialize and have a drink at an establishment called the Janitor's Closet. While there, they happened to meet a fellow police officer and friend, Gregory Larmour, who was with a female named Marlene White. At that time, the three police officers decided to take Ms. White home. The events which transpired upon arriving at Ms. White's home are not definitely known but are not in dispute in this action. However, the following day,

Mr. Kersey and Mr. Freeman each were directed to report to the Chesapeake Police Department with their service revolvers and their badges. (A. Vol. II: P. 431) Upon arriving at the Chesapeake Police Department, Mr. Kersey and Mr. Freeman were informed that Ms. White had made a complaint of unknown substance against them but concerned their misconduct. (A. Vol. II:p. 432) At that time, Mr. Kersey and Mr. Freeman were suspended without pay pending the outcome of an administrative investigation in reference to that misconduct. (A. Vol. I: p. 160) This suspension was confirmed by a letter from the respondent, R. A. Lakoski, Chief of Police, March 5, 1979. (A. Vol.I: p. 160).

On March 4, 1979, the petitioners reported to the Norfolk Police Department in order to be arrested on simple assault charges. The administrative

investigation conducted by the Chesapeake Police Department was left in abeyance until the criminal charges against petitioners were resolved. On April 26, 1979, the appellants were tried in the General District Court of the City of Norfolk, Virginia (Criminal Division). The criminal charges against Mr. Kersey and Mr. Freeman were dismissed in each case because of insufficient evidence. (A. Vol. II:p.439).

On April 30, 1979, the appellants reported to the headquarters of the Chesapeake Police Department for an investigative inquiry as to accusations and complaints filed by Ms. White alleging immoral conduct on March 2, 1979. By letter of April 30, 1979, from appellee, I. M. Shipley, Jr., who was then the acting Chief of Police in the absence of Chief Lakoski, the appellants

were told that the basic allegation by Ms. White was that they had had sexual relations with her without her permission. They were further told that a hearing on the matter would be conducted as soon as the investigation was completed. (A. Vol. II:p. 452). Ms. White was not present at the proceeding.

During the course of the April 30, 1979, proceeding, Mr. Kersey and Mr. Freeman both stated to acting Chief Shipley that they had been advised, prior to the criminal proceeding, not to discuss the case. (A. Vol. II:p.279). After hearing the testimony of one witness on behalf of the petitioners, acting Chief Shipley suspended the proceeding until May 3, 1979, and stated that it was his hope that he could arrive at a decision on that date. (A. Vol. II: p. 452).

On May 3, 1979, the petitioners arrived at the Chesapeake Police Department, along with Mr. Lamour, and were separately read the following letter dated May 2, 1979, and signed by acting Chief Shipley (some paragraphs omitted):

> The division is now investigating the charges brought against you through the complaint of Marlene June White. You were given written notice of these charges and of the investigation into the charges on April 30, 1979. Because there is not enough circumstantial evidence or testimony by witnesses to make a satisfactory evaluation of the truth of the charges made against you, I am ordering you to take a polygraph examination in which you will be asked questions relating to those charges.
>
> If you refuse to take the polygraph examination, you will be refusing to obey a direct order. As a consequence, your suspension without pay will be continued, and you will be given written notice that you are charged with disobeying a direct order; that such disobedience constitutes grounds for

> disciplinary action, including dismissal; and that you have five (5) calendar days in which to respond to the charge.

Mr. Freeman and Mr. Kersey each indicated that they would be willing to take the examination but that they had been taken by surprise when they received the polygraph examination order and therefore requested that they be allowed to consult with their attorney prior to taking the polygraph examination. (A. Vol. II:p.455-456). The petitioners were given permission to go see their attorney but were cautioned to return to police headquarters or telephone by 6 o'clock that evening or else face a charge of disobeying a direct order.

Mr. Kersey and Mr. Freeman left the Chesapeake Police Department at approximately 4 o'clock p.m. and travelled to Norfolk where their attorney maintained his office. On that particular day, the

attorney had a waiting room full of clients and, therefore, the appellants were precluded from seeing their attorney that day. (A. Vol. II:p. 457-459).

After waiting in their attorney's office until approximatley 6 o'clock p.m. without seeing their attorney, they decided to telephone the Chesapeake Police Department and request that they be permitted to take the polygraph examination the following day. The petitioners felt very confused by the events which had transpired that day and both were feeling the effects of great stress and physical illness. (A. Vol. II: p. 459). After relating their feelings and requests to Captain Justice of the Chesapeake Police Department, Captain Justice refused the requests stating that he was "just following direct orders" and further, "You take it now or

never. There is no tomorrow. This is it." (A. Vol. II:p. 461).

Mr. Kersey and Mr. Freeman did not take the polygraph examination on May 3, 1979. Because of their feelings of confusion, stress and illness, they went to their homes for the rest of the evening. The next day, they were able to communicate with their attorney who wrote a letter to acting Chief Shipley stating that he did not feel that it was proper, under the circumstances, to order the appellants to take the polygraph examination and that he had recommended to the petitioners that they not take the polygraph examination. (A. Vol.III:p. 521).

Later that evening, Mr. Kersey and Mr. Freeman were directed to report to police headquarters in Chesapeake the next day, May 5, 1979. Upon their

arrival at police headquarters, pursuant to the directions, the petitioners received identical letters from acting Chief Shipley dated May 4, 1979. (A. Vol. II:p. 463-466). In pertinent part, this letter stated:

> On May 3, 1979, you were ordered by me to take a polygraph examination as part of an administrative examination of charges made against you through thecomplaint of Marlene June White. You were notified in writing at that time that if you refuse to take the examination, you would be refusing to take a direct order. You refused to take the examination as ordered.
>
> This letter is to inform you that you are now charged with disobeying a direct order; that your current suspension without pay is continued; that your action constitutes grounds for disciplinary action, including dismissal; and that you have five (5) calendar days from your receipt of this letter in which to respond to the charge...
>
> After the five (5) days allowed for your response have passed, a final decision will be made on this charge. That

> decision may prescribe the disciplinary action against you ranging up to dismissal from the Division.

On May 10, 1979, Mr. Kersey and Mr. Freeman were given a letter signed by Chief Lakoski acknowledging the receipt of the petitioners' attorney's letter of May 4, 1979. It further stated that the petitioner's suspension would remain in effect until the Chesapeake City Attorney had had time to render an opinion with respect to whether the petitioners had been properly ordered to take the polygraph examination. On May 22, 1979, Chief Lakoski terminated the employment of Mr. Freeman and Mr. Kersey because of their refusal to obey a direct order. (A. Vol. II:p. 473).

Mr. Kersey and Mr. Freeman duly requested a hearing under the Law

Enforcement Officers Procedural Guarantees Statute. At that hearing, Chief Lakoski and acting Chief Shipley testified against the petitioners. (A. Vol. II:p. 370). The panel presiding at the hearing found in favor of the petitioners and recommended that Mr. Freeman and Mr. Kersey be reinstated to their employment as Chesapeake Police Officers. (A. Vol. II:p. 374). Subsequently, on July 24, 1979, Chief Lakoski wrote a letter to both Mr. Kersey and Mr. Freeman stating that;

> After reviewing all investigative reports and letters pertaining to the charge of your disobeying a direct order and taking under advisement the recommendations of the panel pertaining to the Law Enforcement Officers' Procedural Guarantees, it is my decision that you did disobey a direct order of the acting Chief of Police.
>
> Therefore, the decision that was rendered to you on

May 22, 1979, that your employment with the Chesapeake Police Department is terminated that date, is still in effect.

The Chief's decision was reviewed by the City Manager of the City of Chesapeake Police Department, John T. Maxwell, who affirmed the Chief's decision. (A. Vol. II:p. 348-49).

On May 19, 1980, Mr. Kersey and Mr. Freeman filed Complaints in the United States District Court for the Eastern District of Virginia, Norfolk Division, alleging that they had been treated arbitrarily and capriciously and that the respondents had acted separately and in concert, willfully, knowingly and purposely with the intent to deprive petitioners of their rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States, Title 42 of the United States Code, Section 1983 and

Title 18 of the United States Code, Section 245 and that they had been deprived of the due process guaranteed them under Section 2.1-116.1 of the Code of Virginia, 1950, as amended. (A. Vol. I:p.1-7). As a form of relief the petitioners requested reinstatement to their former positions as police officers and back wages. (A. Vol.I:p. 6).

Subsequent to the testimony of a number of the petitioners' witnesses, Chief Judge Richard B. Kellam directed a verdict in the favor of the respondents and ordered that the action be dismissed on the merits. (A. Vol. III: p.644). After dismissing the jury, Judge Kellam allowed the petitioners' attorney to make proffers of proof to the effect that Jensen Sawyer, the Law enforcement Officer Procedural Guarantees Hearing panel member picked by the Chief of Police, had made previous threats that he would fire petitioners if given the chance. (A. Vol. III:p. 679)

6. Reasons for Granting the Writ

ARGUMENT

Question (a): Whether the petitioners were denied their procedural due process rights guaranteed by the Fourteenth Amendment of the United States Constitution?

It is a well settled concept that due process must be procedurally meaningful. Boddie v. Connecticut, 401 US 371 (1971). At a minimum, procedural due process requires the right to notice and an opportunity to be heard at a meaningful time and in a meainingful manner. Fuentes v. Shevin, 407 US 67 (1972).

It is the petitioners' position that the hearing afforded them pursuant to the Law Enforcement Officers Procedural Guarantees statute embodied in the Code of Virginia, 1950, as amended, Section 2.1-116 et seq., precluded them from

being heard in a meaningful manner.

Under the Law Enforcement Officers' Procedural Guarantees statute, the decision of the panel is advisory only. The Chief of Police is empowered to make a decision that directly conflicts with the recommended decision of the panel, but the recommended panel decision must be accorded significant weight. Section 2.1-116.7 of the Code of Virginia, 1950, as amended.

However, it is submitted that the actions of the Chief of Police, in this particular case, deprived the petitioners of their right to meaningful procedural due process. This follows from the fact that the Chief appointed one of the panel members. That particular panel member may have been shown to be prejudiced against the petitioners. Additionally, the Chief testified at the

hearing adversely to petitioners, thereby publicly displaying his impartiality. It is petitioners' position that this impartiality as well as a showing of bad faith in appointing that particular panel member is sufficient to create a prima facie case with respect to the violation of petitioners' rights to due process.

The test of due process has been simply but amply defined as fundamental fairness. Watson v. Patterson, 358 F. 2d 297, cert. denied, 385 US 876 (1966). However, whether one has been afforded fundamentally fair procedural due process must depend on, and be viewed in the light of the total circumstances of each individual case. Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (1966), Palmer v. Columbia Gas of Ohio, Inc.,

479 F. 2d 153 (1973).

Clearly, an element of fundamental fairness is the impartial decision maker. Hampton v. Fitzgerald, 409 US 1055 (1972), Holt v. Commonwealth of Virginia, 381 US 131 (1965). Without such an element, due process could never be meaningful.

Here, it is petitioner's position that because of the Chief's appointment of a prejudiced panel member, because of the Chief testifying against petitioners during the panel hearing, and because the Chief overruled the panel decision without any statement as to the reasons for such a decision or upon which evidence he relied, a mockery has been made of our free society's ultimate guarantee. This would appear to be the type of activity contemplated by the Court as that which shocks the sense of fair play. See, Howard v. United States, 372 F 2d 294 cert. denied, 388 US 915 (1967).

Although the Chief literally complied with the Law Enforcement Officers Procedural Guarantees statute by appointing a panel member and overturning the majority panel decision, he exceeded the bounds of propriety when he testified against petitioners and subsequently overturned the majority panel decision without stating the reasons for his decision or indicating the evidence upon which he relied.

It is a combination of the Chief's activities and involvement with respect to the petitioner's panel hearing which creates the appearance of unfairness. As the ultimate decision maker in petitioners' case, due process mandated that the Chief take every precaution to avoid the appearance of impartiality. This is the only way to comply with the fair trial in a fair tribunal concept of due process.

The Courts have consistently held that the law endeavors to prevent the probability of unfairness. Amos Treat and Co. v. Securities and Exchange Commission, 306 F 2d 260 (1962), United States v. Gower, 447 F 2d 187 cert. denied, 404 US 850 (1971). Withrow v. Larkin, 421 US 35 (1975), Semard v. Board of Ed, Town of Groton, Connecticut, 473 F 2d 988 (1973).

The risk of prejudgment, or even the appearance thereof, must be avoided at all costs. Had the Chief set forth the reasons for his action in overturning the panel hearing and explained the evidence upon which he relied in so deciding, it may have erased any previous appearance of impartiality by testifying against the petitioners. The Chief, however, did not do this. The Court in Jarecha v. Immigration and Naturalization

Service, 417 F 2d 220 (1969), dealt with a similar situation to this case where administrative discretion was exercised by one empowered to make decisions in matters involving individual rights. That Court held that due process mandated a written decision or, at least, a record of the administrative hearing which would clearly define the grounds upon which such discretion was exercised. The purpose for the due process requirement of a written decision was to enable a Court to determine whether the administrative decision was arbitrary, capricious or supported by reasonable, substantial and probative evidence. Id. at 225. The petitioners contend that since no written reasons or known supporting evidence was indicated in the Chief's decision, a Court can only assume, in light of the totality of the circumstances, that the Chief's decision was

arbitrary, capricious or not supported by reasonable, substantial or probative evidence.

Question (b): Whether the District Court Judge improperly directed a verdict for the respondents?

The Appeals Court affirmed the opinion of the District Court and concluded that no evidence had been introduced to show that the decision was arbitrary and capricious. As stated above, it is the petitioner's position that the actions of the Chief of Police in themselves indicate that his decision was either aribtrary, capricious or not supported by reasonable, substantial or probative evidence.

The Court of Appeals was bound to view the evidence and the reasonable inferences therefrom in the light most favorable to the petitioners, even though contrary infererces might reason-

ably be drawn and "it is the jury which 'weighs the contradictory evidence and inferences' and draws the 'ultimate conclusion as to the facts'." Continental Co. v. Union Carbide, 370 US 690, 696, 700-701, (1962).

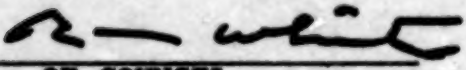
Viewed in the light of the totality of circumstances, a reasonable inference to be drawn from the Chief's actions is that the appearance of impropriety was present and, therefore, the petitioners' rights of procedural due process were violated. As stated above, substantial evidence with respect to the Chief's actions were introduced into evidence in the District Court proceedings sufficient to enable such an inference. It is therefore the petitioners' position that the District Court Judge improperly directed a verdict for the Respondents.

CONCLUSION

We therefore request that the decision of the Circuit Court be reversed and that this Court enter an Order remanding this case to the District Court for a new trial by jury.

Respectfully Submitted,

JOEL D. KERSEY, JR.
and
LOUIS RAY FREEMAN

BY: 
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and upon Counsel for the Respondents, Peter C. Manson, Jr., 160 Newtown Road, Suite 415, Virginia Beach, Virginia, 23462.

Robert M. White
Counsel for Petitioner

APPENDIX A

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOEL D. KERSEY, JR.
and
LOUIS RAY FREEMAN

CIVIL ACTION 80-552-N
FILE NO. 80-553-N

vs.

JUDGMENT

I.M. SHIPLEY, JR., R.A. LAKOSKI,
JOHN T. MAXWELL and CITY OF CHESAPEAKE

This action came on for trial before the Court, Honorable Richard B. Kellam, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered on the defendants' motion for directed verdict,

It is Ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants, I.M. Shipley, Jr., R.A. Lakoski, John T. Maxwell and City of Chesapeake, recover of the plaintiffs,

Joel D. Kersey, Jr. and Louis Ray Freeman, their costs of action.

Dated at Norfolk this 24th day of February, 1981.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1279

Joel D. Kersey, Jr. and
Louis Ray Freeman,

Appellants,

v.

I.M. Shipley, Jr.,
R.A. Lakoski, John T.
Maxwell, and City of Chesapeake,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Senior District Judge.

Argued: December 8, 1981 Decided: March 22,1982

Before WIDENER, ERVIN, and CHAPMAN, Circuit Judges.

David B. Schultz, Robert M. White (White & Selkin on brief) for Appellants; Peter C. Manson, Jr. (Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan; Ronald S. Hallman, City Attorney, City of Chesapeake; Samuel J. Webster, Williams, Worrell, Kelly & Greer on brief) for Appellees.

ERVIN, Circuit Judge

This case arises from the alleged unlawful discharge of Joel D. Kersey, Jr. and Louis R. Freeman, two former policemen for the City of Chesapeake, Virginia. Although Kersey and Freeman were afforded notice and a hearing pursuant to the Law-Enforcement Officers' Procedural Guarantees, Va. Code §2.1-116.1 et seq. (1979), they brought a 42 U.S.C. §1983 action against the City of Chesapeake and other city officials[1] claiming that they had been denied their constitutional right to "meaningful" due process of law. This claim was predicated on their contentions that: 1) they received no hearing prior to termination; 2) one of the panel members at the hearing held subsequent to their termination was biased against them; and 3) the Chief of Police

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[1]In addition to the City of Chesapeake, Kersey and Freeman sued John T. Maxwell, the City Manager; R.A. Lakoski, the Chief of Police; and I.M. Shipley, Jr., the Deputy Chief of Police.

arbitrarily and capriciously rejected the recommendation of the panel that Kersey and Freeman be reinstated to their positions with the Chesapeake Police Department.

The district court granted defendants' motion for a directed verdict after Kersey and Freeman had presented their evidence. We find no error below and, accordingly, affirm.

I.

Kersey and Freeman had been police officers for approximately five years when they were discharged from the Chesapeake Police Department. The events leading to their termination began on March 3, 1979, when a complaint involving sexual misconduct was filed against them in Norfolk, Virginia. They immediately were suspended from the police force without pay pending the outcome of an administrative investigation concerning the alleged

misconduct.[2]

In connection with the investigation, Acting Chief Shipley[3] ordered Kersey and Freeman to undergo a polygraph examination.[4]

---

[2]Although the charges against Kersey and Freeman were tried in the General District Court of Norfolk, Virginia, and dismissed on April 26, 1979, the Chesapeake Police Department continued its investigation concerning the matter.

[3]Deputy Chief Shipley had been appointed hearing officer for the investigation.

[4]When Kersey and Freeman applied for employment with the Police Department, they gave sworn, affirmative answers to the following questions:

72. Are you willing to submit to discipline and the lawful orders of superior officers?

73. If employed by the Division of Police or Fire, do you agree to submit to a polygraph examination* if requested to do so by the Chief of the division?

74. Do you agree to assist the Division of Police or Fire in the investigation of any complaint made against you?

*Kersey and Freeman do not challenge use of the polygraph by the Chesapeake Police Department.

They were informed on May 3, 1979, that if they refused to take it, they could be dismissed for disobeying a direct order. After consulting with their attorney, Kersey and Freeman refused to take the polygraph examination.

On May 22, 1979, Chief Lakoski notified them by letter that they had been terminated for refusing to obey a direct order but that they had a right to appeal the decision. A hearing was conducted on June 20, 1979, before a three-member panel consisting of a member chosen by Kersey and Freeman, a member chosen by Chief Lakoski, and a member selected by the other panelists. Following the testimony, the hearing panel, by a two-to-one vote, recommended that Kersey and Freeman be reinstated to their positions with the Chesapeake Police Force.

Chief Lakoski subsequently informed them that he had considered the recommendation, but had decided to uphold their termination because they had disobeyed a direct order. Kersey and

Freeman then appealed to the City Manager of the City of Chesapeake. After reviewing police reports, the transcript of the hearing, the Operations Procedures Manual of the Chesapeake Police Department, and whether Kersey and Freeman had disobeyed a direct order, the City Manager upheld Chief Lakoski's decision.

II.

Due process under the Fourteenth Amendment requires that state governments provide minimal procedural safeguards, including some form of notice and a hearing, before taking action that deprives an individual of "liberty" or "property." See Board of Regents v. Roth, 408 U.S. 564 (1972). Property interests in employment positions are not created by the Constitution, but rather, are created and their dimensions defined by independent sources such as state law, local ordinances, and employment contracts. Id. at 577. See Bishop v. Wood, 426 U.S. 341 (1976). In Himmelbrand v.

Harrison, 484 F. Supp. 803 (W.D. Va. 1980), the court held that Virginia policemen have "a 'legitimate claim of entitlement to continued employment' at least to the extent that (the Law-Enforcement Officers' Procedural Guarantees statute) furnishes insurance against arbitrary employment actions." Id. at 808. Thus, Kersey and Freeman were denied due process under the Fourteenth Amendment only if they were deprived of the benefits conferred by Va. Code §2.1-116.1 et seq. (1979). See id.

A.

Kersey and Freeman first contend that their right to due process was violated because they were not given a hearing prior to their discharge from the Chesapeake Police Department. We disagree.

Section 2.1-116.5(1) of the Code of Virginia provides that "Whenever a law-enforcement officer is dismissed...for punitive reasons, he may, within a reasonable amount of time

following such action, as set by the agency, request a hearing." (emphasis added). That there is no automatic right to a pre-termination hearing is underscored by another provision that such a hearing may be provided "at the option of the agency." Va. Code, §2.1-116.5(3). Because the scope of the property interest in continued employment with the Chesapeake Police Department is defined by the Law-Enforcement Officers' Procedural Guarantees, which provides that there is no automatic right to a pre-termination hearing, we find that failure to afford Kersey and Freeman a hearing prior to their discharge did not violate due process.

B.

Kersey and Freeman next contend that they were denied due process because one of the panel members at the hearing was biased against them. The claim is based entirely on the fact that Chief Lakoski selected a panel member and the panel member voted against Kersey and Freeman.

Consideration of the Law-Enforcement Officers' Procedural Guarantees reveals that the claim clearly is without merit.

Section 2.1-116.5(2) provides:

> The hearing shall be conducted by a panel, such panel to consist of one member from within the agency selected by the grievant, one member from within the agency of equal rank of the grievant but no more than two ranks above appointed by the agency head, and a third member from within the agency to be selected by the other two members.

(emphasis added).

The hearing panel in this case was comprised of an individual chosen by Kersey and Freeman, an individual chosen by Chief Lakoski, and a third individual chosen by the two previously chosen members. Chief Lakoski obviously did not offend the due process rights of Kersey and Freeman by appointing a panel member when he merely was fulfilling his statutory duty to make an appointment.[5]

---

[5]Furthermore, the issue whether a panel member was biased essentially is moot in that the panel decided in favor of Kersey and Freeman.

C.

Finally, Kersey and Freeman contend that they were denied due process because Chief Lakoski arbitrarily and capriciously rejected the recommendation of the panel that Kersey and Freeman be reinstated to their positions with the Chesapeake Police Department. We disagree.

Section 2.1-116.7 of the Law-Enforcement Officers' Procedural Guarantees provide s that the recommendation of the panel "shall be advisory only, but shall be accorded significant weight." As the court in Himmelbrand v. Harrison, supra, observed:

> This court cannot presume that an employer would automatically or arbitrarily ignore the conclusions of a grievance panel assembled pursuant to Va. Code §2.1-116.5.2 (1979). Rather, the appropriate judicial presumption would seem to be that when all the facts come to light, official action will be "regular." Bishop v. Wood, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed 2d 684 (1976).

484 F. Supp. at 808, n.9.

In this case, Chief Lakoski indicated in a letter to Kersey and Freeman that he had considered the recommendation of the panel but had decided to uphold their termination because they had disobeyed a direct order. There is no evidence suggesting that the decision was arbitrary and capricious. It is undisputed that the Chief of Police gave Kersey and Freeman a direct order to undergo a polygraph examination in connection with an ongoing investigation, they were informed that refusal could result in dismissal, and they refused to take the polygraph examination, nonetheless. In light of these facts, it does not appear that the decision of Chief Lakoski was arbitrary. We find, therefore, that Chief Lakoski did not violate due process when he rejected the recommendation of the panel. Cf. Prince v. Bridges, 537 F. 2d 1269).

III.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

APPENDIX C

United States Constitution

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CHAPTER 10.1.
LAW-ENFORCEMENT OFFICERS' PROCEDURAL GUARANTEES.

§ 2.1-116.1. Definitions.--As used in this chapter, the following terms have the following meanings:

1. "Law-enforcement officer" means any person, other than a Chief of Police or the Superintendent of the Department of State Police, who, in his official capacity, is authorized by law to make arrests and who is a nonprobationary member of one of the following law-enforcement agencies:

(a) The Department of State Police;

(b) The police department, bureau or force of any political subdivision of the Commonwealth of Virginia where such department, bureau or force has ten or more law-enforcement officers; provided however, this shall not include the sheriff's department of any city or county.

2. "Agency" means:

(a) The Department of State Police;

(b) The political subdivision of the Commonwealth of Virginia employing the law-enforcement officer. (1978, c. 19; 1979, c. 592.)

§ 2.1-116.2 Conduct of investigation.--Whenever an investigation by an agency focuses on matters which could lead to the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer, the following conditions shall be complied with:

1. Any questioning of the officer shall take place at a reasonable time and place as designated by the investigating officer, preferably when the officer under investigation is on duty and at the officer of command of the investigating officer or at the office of the local precinct or police unit of the officer being investigated, unless circumstances dictate other-

wise.

2. Prior to the officer being questioned, he shall be informed of (i) the name and rank of the investigating officer and of any individual to be present during the questioning and (ii) the nature of the investigation. (1978, c. 19.)

§ 2.1-116.4. Notice of charges; response.--Before any dismissal, demotion, suspension without pay or transfer for punitive reasons may be imposed, the following must be complied with:

1. The law-enforcement officer shall be notified in writing of all charges, the basis therefor, and the action which may be taken;

2. The law-enforcement officer must be given an opportunity, within a reasonable time limit after the date of the written notice provided for above, to respond orally and in writing to the charges. The time limit shall be determined by the agency, but in no event shall it be less than five calendar days unless agreed to by the law-enforcement officer; and

3. In making his response, the law-enforcement officer may be assisted by counsel at his own expense. (1978, c.19.)

§ 2.1-116.5. Hearing.--1. Whenever a law-enforcement officer is dismissed, demoted, suspended or transferred for punitive reasons, he may, within a reasonable amount of time following such action, as set by the agency, request a hearing. If such request is timely made, a hearing shall be held within a reasonable amount of time set by the agency; provided, however, that the hearing shall be set no later than fourteen calendar days following the date of request unless a later date is agreed to by the law-enforcement officer. At the hearing, the law-enforcement officer and his agency shall be afforded the opportunity to present evidence, examine and cross-examine witnesses. The panel shall have the power to, and on the request of either the law-enforcement officer or his agency shall, issue subpoenas requiring the testimony of witnesses who have refused or failed to appear at the hearing. The law-enforcement officer shall also be given the

opportunity to be represented by counsel at the hearing unless such officer and agency are afforded, by regulation, the right to counsel in a subsequent de novo hearing. The panel conducting the hearing shall rule on the admissibility of the evidence. A record shall be made of the hearing.

2. The hearing shall be conducted by a panel, such panel to consist of one member from within the agency selected by the grievant, one member from within the agency of equal rank of the grievant but no more than two rnaks above appointed by the agency head, and a third member from within the agency to be selected by the other two members. In the event that such two members cannot agree upon their selection, the chief judge of the judicial circuit wherein the duty station of the grievant lies shall choose such third member.

3. At the option of the agency, it may, in lieu of complying with the provisions of § 2.1-116.4, give the law-enforcement officer a statement, in writing, of the charges, the basis therefor, the action which may be taken, and provide a hearing as provided for in § 2.1-116.5 prior to dismissing, demoting, suspending or transferring for punitive reasons the law-enforcement officer. (1978, c. 19; 1980, c.191.)

§ 2.1-116.6. Immediate suspension.--Nothing in this chapter shall prevent the immediate suspension without pay of any law-enforcement officer whose continued presence on the job is deemed to be a substantial and immediate threat to the welfare of his agency or the public, nor shall anything in this chapter prevent the suspension of a law-enforcement officer for refusing to obey a direct order issued in conformance with the agency's written and disseminated rules and regulations. In such a case, the law-enforcement officer shall, upon request, be afforded the rights provided for under this chapter within a reasonable amount

of time set by the agency. (1978, c. 19.)

§ 2.1-116.7. Outcome of hearing.--The recommendations of the panel, and the reasons therefor, shall be in writing, shall be transmitted promptly to the law-enforcement officer or his attorney and to the chief executive officer of the law-enforcement agency. Such recommendations shall be advisory only, but shall be accorded significant weight. (1978, c. 19.)